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NO. COA01-912

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

STATE OF NORTH CAROLINA,

v.

CAROL LAFFERTY COLT and

DANIEL WAYNE STEPHENS

Carteret County
Nos. 99 CVS 10089, 10090,
10091 and 00CRS 2302;
99 CVS 00 10086, 10087,
10088 and 00 CRS 2301

Appeal by defendants from judgments entered 7 September 2000 by Judge Russell J. Lanier in Carteret County Superior Court. Heard in the Court of Appeals 14 May 2002.

Attorney General Roy Copper, by Special Deputy Attorney General Ted R. Williams, for the State.

E. Daniels Nelson, for the defendants.

BIGGS, Judge.

Carol Colt and Daniel Stephens (defendants) were tried jointly on charges of possession with intent to manufacture, sell and deliver marijuana, knowingly and intentionally keeping or maintaining a dwelling for purposes of keeping a controlled substance, misdemeanor possession of drug paraphernalia and misdemeanor possession of hashish. Both were convicted of the lesser included offense of felony possession of marijuana and knowingly keeping a dwelling for purposes of keeping a controlled

substance. Colt was also convicted of misdemeanor possession of drug paraphernalia and misdemeanor possession of hashish; Stephens was found not guilty of these offenses. For the reasons herein, we vacate defendant Stephens' conviction for felonious possession of marijuana and find no error in all remaining convictions of both defendants.

The State presented the following evidence at trial: On 15 October 1999, at approximately 9 p.m., Officer Troy Edwards was dispatched to the Handle Bar Restaurant, in Beaufort, North Carolina, in response to a disturbance call. Eye witnesses explained to the officer that a fight had occurred; that the suspected assailant, Jeremy Coy, left the scene in a red Ford Escort; and, that they believed the suspect was going to defendant Stephens' house. Officer Edwards went with two other police officers to Stephens' residence and, upon arrival, observed a red Ford Escort parked in front of a triplex.

The police officers went to the first apartment in the triplex where the resident, Christine Coy Teal, explained that Jeremy Coy was her son and that he was at Stephens' apartment further down the driveway. Teal led the officers down a driveway to Stephens' apartment. The police officers detected the odor of marijuana coming from a window of the apartment. According to Officer Edwards, "there was a clear view into the room and [he] observed defendant Colt sitting on the couch and it appeared that she was smoking marijuana at that time."

The officers knocked on the door of the apartment. When Colt

answered the door, the officers explained that they were looking for Jeremy Coy and a source told them he was in the apartment. Colt allowed them inside. While inside the apartment, the officers observed a small ashtray with a pair of hemostats and two marijuana cigarettes, or "roach heads", attached to them. In addition, the officers observed a small rectangular metal tin on the couch near the ashtray. One of the officers opened the tin box and observed two bags of what appeared to be approximately two ounces of marijuana rolled up inside each bag.

Officer Edwards obtained a search warrant while another officer secured the residence. Upon executing the search warrant, the officers seized the following items: two additional plastic bags of what appeared to be marijuana discovered in a red coffee can in the laundry room, a clump of brown material wrapped up in tinfoil in the coffee can, four firearms, ammunition, and varying quantities of cash found in the bedroom, living room, and kitchen area.

Stephens was not present during the initial entry by the officers, but arrived as the officers were executing the search warrant. Although Stephens explained that he lived there, the officers would not allow him to enter until they completed the search of the apartment. Following the search, Colt and Stephens were arrested and taken into custody. The State Bureau of Investigation determined, and both parties stipulated, that the material found at the residence was marijuana and the brown material was hashish.

Defendants offered the following testimony at trial: When the officers knocked on the door and asked to enter to look for Jeremy Coy, Colt explained, ". . . he is not here, . . . [she] didn't think there was any need for them to come in and look around", and she was not properly dressed at the time. She further explained that Stephens was on his way to the Bar in response to the reported disturbance. However, when the officers continued to persist, Colt finally "backed away from the door". Colt testified that she smoked marijuana every night before she went to sleep as her "own little civil disobedience", but explained that Stephens "doesn't really smoke . . . . because of his responsibilities at the bar." Colt also testified that there was only one marijuana joint on the table and not two, as Officer Edwards testified. Both Colt and Stephens testified that Stephens did not know that the marijuana and hashish were in the house. Stephens testified that the guns were a part of his gun collection. Teal, Colt, and Stephens testified that the large amount of cash in the house was used to pay bills and included tips from the Bar.

From their convictions, both defendants appeal. Though defendants filed a joint brief, we find it necessary to consider their claims individually.

Stephens' Appeal

Stephens first contends that the trial court committed reversible error in denying his motion to dismiss all charges against him. In response to his motion to dismiss, the trial court declined to submit the charged offense of possession with intent to

manufacture, sell and deliver marijuana to the jury and, instead, charged the jury on the lesser included offense of felonious possession of marijuana. In addition, the court denied defendant's motion to dismiss the charge of intentionally and knowingly maintaining a dwelling for the purpose of keeping a controlled substance. Defendant argues that there is no physical or testimonial evidence that links him to the seized material or the crimes and thus, all charges against him should have been dismissed.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense." *State v. Lynch,* 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990) (citation omitted). "When ruling on a motion to dismiss, all the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis,* 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies in the evidence are for resolution by the jury." *State v. Brown,* 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

We first examine defendant's motion to dismiss the charge of felonious possession of marijuana. Possession of a controlled

substance may be actual or constructive. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Here, the State has produced no evidence of actual possession by Stephens but rather proceeded on the theory of constructive possession.

"Constructive possession exists when a person, while not having actual possession of the controlled substance, has the intent and capability to maintain control and dominion over a controlled substance." *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993) (citation omitted). "[I]n order to show constructive possession by a defendant *not present when a controlled substance was discovered*, the State must present evidence that the defendant had exclusive use of the premises, maintained the premises as a residence, or had some apparent proprietary interest in the premises or the controlled substance." *State v. Hamilton*, 145 N.C. App. 152, 156, 549 S.E.2d 233, 235 (2001) (emphasis added). If, however, the defendant had nonexclusive control of the premises in question, the State must show evidence of "other incriminating circumstances" to support a theory of constructive possession. *State v. Morgan*, 111 N.C. App. 662, 665, 432 S.E.2d 877, 879 (1993). "Evidence that raises only a strong suspicion without producing any incriminating circumstances does not reach the level of substantial evidence necessary for the denial of a motion to dismiss." *Hamilton*, 145 N.C. App. at 158, 549 S.E.2d at 237.

In *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987), though defendant resided at a home where drug paraphernalia

was found, our Supreme Court concluded that her control of the premises was "patently nonexclusive", since evidence showed that her husband also lived in the home, and, her husband and another man were seen in the home that day. Further, the Supreme Court held that the State had not presented any other incriminating evidence which suggested that defendant had control of the drug paraphernalia; therefore, the trial court was correct in granting her motion to dismiss.

McLaurin is in contrast to *State v. Davis,* 325 N.C. 693, 386 S.E.2d 187 (1989), in which the Supreme Court held there was sufficient evidence to deny a motion to dismiss on the charge of possession of narcotics. In *Davis*, the defendant had nonexclusive possession of a trailer where narcotics were found, since seven other people were present in the home. However, the Court held that the State had presented other incriminating evidence, *i.e.*, the defendant owned the mobile home, white tablets were found in the pockets of defendant's pants, and white tablets were found in the chair on which he had been sitting. *Id*; *see also State v. Baxter*, 285 N.C. 735, 737, 208 S.E.2d 696, 697 (1974) (holding there was sufficient evidence to deny defendant's motion to dismiss, where he was not present, his wife also lived in the house, and there was other incriminating evidence of his guilt, such as marijuana found in a dresser drawer beneath male underclothing, and an envelope containing marijuana found in the pocket of a man's coat).

In the case *sub judice,* the evidence, taken in the light most

favorable to the State, is as follows: Stephens and Colt resided together at the house where the marijuana and contraband were seized; Stephens had left the house a short time before the officers arrived and returned before the officers left; the officers observed Colt sitting alone smoking what appeared to be marijuana; Officer Edwards saw two marijuana cigarettes and two hemostats in the living room; there was evidence that Jeremy Coy, the individual the officers were searching for, may have been at the apartment; the evidence seized included four ounces of marijuana found in a tin can on the sofa, marijuana found in a coffee can in the laundry room, a large amount of cash found in varying locations in the apartment, and four guns.

We conclude that the facts in this case more closely resemble *McLaurin* than *Davis*. In this case, as in *Davis* and *McLaurin,* Stephens' control of the premises was nonexclusive since Colt also lived there. However, unlike in *Davis*, the State, in the present case, did not present evidence of "other incriminating evidence" of Stephens' guilt. Stephens was not present when the officers arrived; the marijuana was not found in an area over which Stephens had exclusive control; it was in an ashtray and tin can. There was evidence that a third individual, Jeremy Coy, may have been in the apartment immediately before the officers arrived. We believe the State has failed to offer substantial evidence of "other incriminating circumstances" from which a jury could find that defendant Stephens was in constructive possession of the marijuana seized from the apartment. We, therefore, conclude that it was

error for the court to allow the charge of felonious possession of marijuana to go to the jury.

Stephens also argues that the trial court erred in denying his motion to dismiss the charge of knowingly and intentionally keeping and maintaining a dwelling for the purpose of keeping controlled substances. N.C.G.S. § 90-108(a)(7) (2001).

The statute reads, in pertinent part:

> (a) It shall be unlawful for any person:
>
> . . . .
>
> (7) To knowingly keep or maintain any . . . dwelling house, building, . . . or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping . . . the same in violation of this Article. . . .

N.C.G.S. § 90-108 (a)(7).

To survive a motion to dismiss, the State must present substantial evidence of the following: "[that defendant] (1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance." *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001). "Whether a person 'keep[s] or maintain[s]' a place, within the meaning of N.C.G.S. § 90-108(a)(7), requires consideration of several factors, none of which are dispositive." *Id.* (citation omitted). Those factors include the following: occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit property; and payment of utility or repair expenses.

Id.; see also, State v. Allen, 102 N.C. App. 598, 608-09, 403 S.E.2d 907, 913-914 (1991), *rev'd on other grounds,* 332 N.C. 123, 418 S.E.2d 225 (1992); *State v. Kelly,* 120 N.C. App. 821, 826, 463 S.E.2d 812, 815 (1995). Here, it is uncontested that Stephens lived at the apartment, with Colt. Thus, at issue is whether the state presented sufficient evidence that Stephens knowingly or intentionally kept or maintained the apartment *for the purpose of keeping controlled substances, or, which is used to keep controlled substances.*

Whether a dwelling is used for knowingly or intentionally keeping a controlled substance "will depend on the totality of the circumstances". *Generally, Frazier,* 142 N.C. App. at 366, 542 S.E.2d at 686 (citing *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994)). This Court has considered such factors as large amounts of cash being found in a place and the place containing numerous amounts of drug paraphernalia, as evidence that a particular place is used to keep or sell controlled substances. *Id.; see also, State v. Bright,* 78 N.C. App. 239, 240, 337 S.E.2d 87, 87-88, *disc. review denied,* 315 N.C. 591, 341 S.E.2d 31 (1986).

The State's evidence, in the present case, tended to show the following: although Stephens was not present when the officers arrived, he had only recently left the premises; at the time the officers arrived, Colt was openly smoking marijuana in such a way that her activity could be seen and smelled by the officers outside of the apartment; a small ashtray with a pair of hemostats and two marijuana cigarettes attached to them were lying on the living room

table in plain view; Colt testified that she smoked marijuana every night; marijuana was found in various other parts of the apartment to which Stephens had access: in the laundry room, the bedroom, living room, and kitchen; and varying amounts of cash were found throughout the apartment.

While this evidence may not be overwhelming, a reasonable person could infer that defendant knowingly or intentionally maintained a residence that is used for the keeping of a controlled substance in violation of N.C.G.S. § 90-108 (a) (7). "To withstand a motion to dismiss, overwhelming evidence is not needed. In close cases, 'courts have consistently expressed a preference for submitting issues to the jury. . . .'" *State v. Jackson,* 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (quoting *State v. Hamilton,* 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. rev. denied,* 315 N.C. 593, 341 S.E.2d 33 (1986)). We hold that, though there was insufficient evidence that Stephens possessed the marijuana seized, the trial court did not err in denying Stephens' motion to dismiss the charge of intentionally or knowingly keeping a dwelling which was used for the purpose of keeping a controlled substance.

Stephens finally argues that (1) the trial court erred in giving the same jury instruction for both defendants, and (2) the court's use of "guilty" first on the verdict sheet, to describe the jury's choices was suggestive, misleading and confusing, and amounted to plain error. We decline to address these issues.

First, Stephens failed to object to the jury instructions or

the verdict sheet at trial as required by Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. The rule provides that, "in order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make." When the trial court asked at the end of the jury charge, if there were any corrections or additional instructions, defendant's counsel stated that there were not.

Moreover, none of Stephens' assignments of error address either the jury instructions or the verdict sheet. The scope of review on appeal is limited to those issues presented by assignments of error in the record on appeal. N.C.R. App. P 10(a); *Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991). Thus, these issues are not properly before this Court.

Accordingly, we vacate defendant Stephens' conviction for felonious possession of marijuana; and, we find no error in the court's denial of Stephens' motion to dismiss the charge of keeping or maintaining a dwelling house for the purpose of keeping a controlled substance.

Colt's Appeal

Colt argues that the trial court erred in denying her motion to dismiss. Specifically, she contends that the officers' initial entry and search of her residence without a warrant was in violation of the Fourth Amendment of the United States Constitution. In addition, Colt argues that it was plain error for

the court to list "guilty" as the first jury choice on the verdict sheet.

It is well-settled that an appellate court may not consider constitutional questions that were neither raised or decided in the court below. *State v. Houston,* 122 N.C. App. 648, 471 S.E.2d 127 (1993); *State v. Crews*, 286 N.C. 41, 47-48, 209 S.E.2d 462, 466 (1974), *cert. denied,* 421 U.S. 987, 44 L. Ed.2d 477 (1975); *State v. Greene,* 33 N.C. App. 228, 229, 234 S.E.2d 428, 429-30 (1977). Since Colt raises the constitutional question of the warrantless search for the first time on appeal, this Court will not consider it. Accordingly, this assignment is dismissed.

In addition, we likewise decline to address Colt's contention that the trial court erred in listing the term "guilty" first on the verdict sheet, in that she, like Stephens, failed to object at trial or to assign it as error.

III.

Lastly, Colt and Stephens argue that the trial court erred in allowing the State to introduce into evidence weapons and cash seized during the search without giving a curative instruction. We find no merit in this assignment.[1]

A trial court may use curative instructions to remove possible prejudice arising from inadmissible or otherwise improper material put before the jury. *See generally, State v. Holmes,* 120 N.C. App. 54, 65, 460 S.E.2d 915, 922, *disc. review denied,* 342 N.C. 416, 465

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[1]Though appellants list assignment of error #2 in their brief as corresponding to this argument, it is assignment of error #4 that actually corresponds to this argument.

S.E.2d 545-6 (1995). However, a trial court does not err by failing to give a curative instruction when it is not requested by the defense. *State v. Williamson,* 333 N.C. 128, 423 S.E.2d 766 (1992)(citation omitted).

In the present case, defendant argues that guns and cash were not relevant to the crimes charged and that he was prejudiced by the failure of the trial court to give a curative instruction.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401; *State v. Whiteside,* 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) ("Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case"). Our Supreme Court has held that "[w]here evidence reasonably tends to prove a material fact at issue in the crime charged, it will not be rejected. . . ." *State v. Jeter,* 326 N.C. 457, 458, 389 S.E.2d 805, 806 (1990).

As stated earlier, this Court has considered a large amount of cash found in a dwelling to be a factor considered in determining whether the place is used to keep or sell controlled substances. *See Frazier,* 142 N.C. App. at 365, 542 S.E.2d at 686; *State v. Bright,* 78 N.C. App. at 240, 337 S.E.2d at 87-88. Moreover, in *State v. Willis,* 125 N.C. App. 537, 543, 481 S.E.2d 407, 411 (1997) this Court has stated that based on their experience in drug trafficking cases, officers could rely on "common sense association

of drugs and guns”.

We conclude that the testimony regarding the guns and money was relevant and properly admitted. Having determined that the testimony was admissible, we further conclude that defendant was not entitled to a curative instruction. Moreover, assuming *arguendo,* it was not admissible, there is no evidence in the record that defendant ever requested a curative instruction. Accordingly, this assignment of error is overruled.

We vacate Stephens’ conviction on the charge of felonious possession and remand for resentencing; we find no error in all other convictions that are the subject of this appeal.

No error in part; vacated in part, and remanded for new sentencing.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).